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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

APPELLANT'S BRIEF

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Opinions Below

The opinion of the Supreme Court of Indiana (R. 196) has not been officially reported. It is unofficially reported at 71 N. E. (2d), 117 and at 67 P. U. R. (N. S., 1947) page 129. The opinion of the Circuit Court of Randolph County, Indiana is not reported. It appears as Appendix B of appellant's Statement As to Jurisdiction herein. The opinion of the Public Service Commission of Indiana, dated November 21, 1945 (R. 116) is not reported. Its first supplemental order, dated April 9, 1946 (R. 180) appears in 63 P. U. R. (N. S., 1946) at page 309.

Jurisdiction

The judgment below was entered February 5, 1947 (R. 196-213), and rehearing was denied March 25, 1947 (R. 220). The Order allowing appeal was entered March 25, 1947 (R. 228-229) and probable jurisdiction was noted May 19, 1947 (R. 235).

The jurisdiction of this Court was invoked under Section 237 of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344 (a)). The appeal is from a final judgment rendered by the highest court of the State of Indiana in which a decision could be had; there is drawn in question the validity of certain statutes of the State of Indiana on the ground of their being repugnant to the Constitution of the United States; and the decision is in favor of their validity.

State Statutes, the Validity of Which Is Involved

The state statutes, the validity of which was drawn in question and sustained in this suit, are:

(1) An order issued by the Public Service Commission of Indiana (hereinafter called "the Commission") November 21, 1945 (R. 116), as supplemented by a further order of the Commission issued April 9, 1946 (R. 180), asserting and exercising jurisdiction and authority to regulate, especially with respect to rates and service, appellant's interstate sales and deliveries, under individual contracts, of natural gas transported by pipe line from Texas and Kansas and delivered in Indiana directly to large industrial consumers.

(2) The Public Service Commission Act of Indiana (Ind. Acts 1941, c. 101, p. 255; Ind. Acts 1945, c. 46,

p. 92; Burns' Indiana Statutes Annotated, 1933, Sections 54-101 *et seq.*) and particularly that paragraph of Section 54-105 (Ind. Acts 1933, c. 190, Sec. 1, p. 928) which defines a "public utility" subject to the provisions of the Act and Section 54-601A (Chapter 53 of the Acts of the General Assembly of Indiana of 1945, referred to as "Section 97A of the Public Service Commission Act" by the Commission in its order).

(1) The Commission's order issued November 21, 1945, and the supplement thereto issued April 9, 1946, constitute a "statute" within the meaning of the term as used in Title 28, U. S. C., Sec. 344 (a).[1]

(2) The Public Service Commission Act of Indiana provides a complete scheme of regulation of "public utilities" and vests authority in the Public Service Commission of Indiana to administer the Act and to issue final legislative orders having the force of law with respect to the business of persons coming within the term "public utility" as defined in Ind. Acts 1933, c. 190, Sec. 1, p. 928; Sec. 54-105, Burns' Indiana Statutes Annotated, 1933, Vol. 10, p. 335. On this section of the Act, the Commission based its jurisdiction to regulate appellant's interstate sales of natural gas to industrial consumers in Indiana. The Supreme Court of Indiana construed this section of the Act as sustaining such jurisdiction (R. 211). The pertinent paragraphs of this section of the Act read as follows:

"Section 54-105 (12672). *Definitions of Terms—Short title of act.* The term 'public utility' as used in this act shall mean and embrace every corporation,

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[1] *Williams* v. *Bruffy*, 96 U. S. 176, 183; *King Mfg. Company* v. *City of Augusta*, 277 U. S. 100; *Ex Parte Williams*, 277 U. S. 267; *Northwestern Bell Telephone Company* v. *Nebraska State Railway Commission*, 297 U. S. 471.

company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control any street railway or interurban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public, but said term shall not include a municipality that may now or hereafter acquire, own, or operate any of the foregoing facilities.

"The term 'utility' as used in this act shall mean every street railway or interurban railway, and every plant or equipment within the state used for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to the public."

Section 54-601A (Chapter 53 of the Acts of the General Assembly of Indiana of 1945) was, as stated in the opinion of the Supreme Court of Indiana (R. 211), "aimed directly at the natural gas business, and by the act a 'gas utility' was defined to mean and include 'any public' utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its, or their domestic, commercial or industrial use." Since it is comparatively short, this particular section of the Public Service Commission Act of Indiana is set forth in full as an Appendix hereto at pages 67-71. Its principal purpose appears to be to vest in the Commission control over competition in the sale of natural gas to industries through the requirement of a certificate of public convenience and necessity before any sale can

lawfully be made. However, Ind. Acts 1913, c. 76, sec. 99, p. 167 (Burns' Ind. Stat. Ann., 1933, Sec. 54-603) prohibits the granting, except to an Indiana corporation or citizen, of any license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility. Appellant is a Delaware Corporation (R. 40).

Other provisions of the Act authorize the Commission to value all the property of every public utility (Sec. 54-203;[2] Ind. Acts., 1933, c. 190, sec. 4, p. 933); to require that a public utility shall keep all books, accounts, papers and records within the state and to prohibit their removal from the state without permission of the Commission (Sec. 54-212; Ind. Acts, 1915, c. 110, sec. 1, p. 457); to inspect and examine any and all books, accounts, papers, records and memoranda kept by such public utility (Sec. 54-215; Ind. Acts, 1913, c. 76, sec. 21, p. 175); to ascertain and determine the proper and adequate rates of depreciation of the several classes of property of each public utility (Sec. 54-216; Ind. Acts 1925, c. 64, sec. 1, p. 210); to supervise and regulate arrangements between a public utility and its customers or consumers or with its employees, such arrangements being unlawful unless approved by the Commission (Sec. 54-221; Ind. Acts 1913, c. 76, sec. 27, p. 177); and to fix rates, charges and regulations governing terms of service (Secs. 54-222 and 54-223; Ind. Acts 1913, c. 76, sec. 28, p. 177). The Act also provides that every public utility shall file its schedules of rates and terms of service with the Commission (Sec. 54-313; Ind. Acts 1913, c. 76, sec. 41, p. 180) and that no changes in schedules of rates and charges shall be made without approval of the Commission (Sec. 54-317; Ind. Acts 1913, c. 76, sec. 45, p. 181); confers upon the Commission extensive authority over management of the business and compensation of officers and

[2] Here, and in each subsequent citation in this paragraph, the first source given refers to the particular section of Burns' Ind. Stat. Ann. 1933, wherein the provision is codified.

employees of a public utility (Sec. 54-402; Ind. Acts 1927, c. 146, sec. 1, p. 445); confers upon the Commission extensive authority over the holders of the voting capital stock of all public utility companies under its jurisdiction, affiliated interests and contracts with affiliates (Sec. 54-403; Ind. Acts 1933, c. 190, sec. 6, p. 935); and confers upon the Commission extensive authority over the issuance and sale of bonds, notes or other evidences of indebtedness by a public utility and the application of the proceeds from the same (Secs. 54-504 and 54-505; Ind. Acts 1933, c. 190, sec. 8, p. 941; Ind. Acts 1913, c. 76, sec. 92, p. 196).

Questions Presented

Appellant seeks to vacate, and to enjoin the enforcement of, certain orders of the appellee Public Service Commission of Indiana (hereinafter called the "Commission"), held by the Supreme Court of Indiana (R. 199) to constitute an unequivocal assertion of power and jurisdiction to regulate rates and service with respect to the direct sale and delivery by appellant to large industrial consumers in Indiana, under individual contracts, of natural gas transmitted by appellant by interstate pipe line from the States of Texas and Kansas.

The basic question for decision is whether Article I, Section 8(3) of the Constitution of the United States, of its own force, denies such power and jurisdiction to the Commission and protects such sales by appellant from state regulation of the character attempted.

Subsidiary questions are presented by appellant's specification of errors (*post*, pp. 15-16).

Statement of the Case

Appellant owns and operates an interstate pipe line for the transmission of natural gas purchased or produced by it in Texas, Kansas, or Oklahoma, extending from gas

fields in Texas and Kansas through Oklahoma, Kansas, Missouri, Illinois and Indiana into Michigan and Ohio (Complaint, par. 2, R. 1, admitted by answer, par. 1, R. 21, Stip. Ptf's. Ex. 2, R. 41, 45, 46, 65).[3] A map of the appellant's transmission system as of May 1, 1944 is included in the transcript (R. 66 A).

The Proceedings Before the Commission

On October 13, 1944 the Commission ordered a formal investigation of appellant's right to supply gas for consumption within the State of Indiana without complying with the requirements of the Indiana Public Service Commission Act relating to Public Utilities (Ind. Acts 1941, Ch. 101, p. 255; Burns' Ind. Stat. Ann. 1933, Sects. 54-101 *et seq.*) particularly with reference to filing with the Commission (a) tariffs, rules and regulations appertaining to natural gas service to consumers within the State of Indiana, (b) annual reports and (c) an original cost report appertaining to its property used and useful in rendering such service, and with reference to keeping books, accounts, papers, and records at an office within the State of Indiana (Ptf's. Ex. 2, R. 116 to 119).

Appellant promptly challenged the regulatory jurisdiction of the Commission with respect to its business, asserting that its sales to consumers in Indiana were wholly in

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[3] Plaintiff's (appellant's) Exhibit No. 2 (R. 37 to 116) is a part of the transcript of the proceedings before the Commission and includes certain stipulations entered into in that proceeding. Pursuant to the order allowing appeal (R. 228) the parties filed a stipulation designating only certain portions of the record for inclusion in the transcript on appeal (R. 229 to 233) which was approved by the Chief Justice of the Supreme Court of Indiana as conforming to the order (R. 234). That stipulation shows that all exhibits designated for inclusion in the record on appeal were admitted in evidence. The admission in evidence of Ptf's. Ex. 2 is so shown (R. 230).

interstate commerce and that any action or order of the Commission purporting to regulate or interfere with such sales would unlawfully burden interstate commerce in violation of Article I, Section 8 (3) of the Constitution of the United States (R. 120).

At that time appellant, in addition to its sales to local distributing companies for resale, was directly selling and delivering natural gas to twenty-three industrial consumers in the various states traversed by its pipe line but had only one such customer in Indiana, Anchor-Hocking Glass Corporation at its plant at Winchester, Indiana (Ptf's. Ex. 2, R. 46, 47), under a contract executed in 1942 (R. 81 to 86). While the proceeding was pending it entered into a contract to supply gas to E. I. DuPont DeNemours Company at its Fortville, Indiana plant.

The uncontroverted facts with reference to the delivery of gas to Anchor-Hocking are as follows:

> Appellant's main line extends eastward to Zionsville, Indiana, where it branches into two lines. One branch runs through Muncie, Indiana, and thence east and slightly south into Ohio, passing a point approximately seven miles south of Winchester (Ex. C to Stipulation of Facts in Ptf's. Ex. 2, R. 66 A). From such point a lateral (Winchester lateral) runs directly north to property owned by Anchor-Hocking adjacent to Winchester which supplies gas both to Anchor-Hocking and to Indiana-Ohio Public Service Company, a local distributing company supplying local consumers in and around Winchester, Portland and Union City in Indiana and Union City, Ohio. The Winchester lateral runs into two meter-houses a short distance apart on real estate owned by Anchor-Hocking. In each of such meter-houses the pressure is further reduced (a reduction from 200 lbs. to 100 lbs. is made when the gas enters the Winchester lateral) and the gas is delivered

at the outlet side of one meter-house to Anchor-Hocking for consumption, and at the outlet side of the other to Indiana-Ohio for resale. The meter-houses and the facilities therein (except the real estate) are owned by appellant. (Stip. Ptf's. Ex. 2, R. 52 to 55.) The agreement with Anchor-Hocking (Ex. N-1 to Stip. of Facts in Ptf's. Ex. 2, R. 81 to 86) provides (Par. 17, R. 85) that the gas sold thereunder will be delivered to the buyer at main or lateral line pressures without any reduction, except such as the seller deems necessary to facilitate measurement and delivery. Delivery to local distributing companies throughout appellant's system is made in many instances by laterals and in making deliveries to distributing companies generally over its system it maintains regulators at its town border metering stations and before delivery reduces the pressure to the extent desired by the distributing company to meet operating conditions in its system (Stip. R. 54).

Anchor-Hocking is the third largest manufacturer and distributor of glass containers in the United States, and its products, for the manufacture of which gas is used, are sold principally in interstate commerce (Stip. R. 47). The volume purchased by Anchor-Hocking in 1943 was 1,150,279 M.C.F., approximately ten times the volume sold to Indiana-Ohio Public Service Company for resale (Stip. Ptf's. Ex. 1, R. 35, 36, shown admitted in evidence, R. 230).

It was also stipulated that,

"* * * all of the natural gas delivered by Panhandle to Anchor-Hocking is gas transported from the States of Texas or Kansas by Panhandle for the purpose and with the intent on the part of Panhandle that gas so transported in the quantities sold to Anchor-Hocking shall be delivered to it" (Stip. Ptf's. Ex. 2, R. 65).

The DuPont contract, entered into while the proceeding was pending, was in all respects similar to the Anchor-Hocking contract (Ex. J-1 to Stipulation of Facts in Ptf's. Ex. 2, R. 67 to 73). Since that service required the construction of additional interstate transportation facilities, appellant filed with the Federal Power Commission an application under Section 7 of the Natural Gas Act (15 U. S. C. Sec. 717f) for a Certificate of Public Convenience and Necessity to construct a lateral to a point near the Town of Fortville, Indiana, to be used to deliver gas to two Indiana utilities for resale and to the DuPont Company for consumption (Stip. Ptf's. Ex. 2, R. 73 to 80). The Commission filed an answer in that proceeding asserting that the proposed sale to DuPont constituted intrastate commerce and that appellant had obtained no Necessity Certificate from the Commission to serve DuPont as required by Ch. 53, Acts of 1945, Indiana, effective as of February 26, 1945 (Appendix p. 68, *infra*) and had failed to file rate schedules, etc., with respect to service to Indiana consumers, and asked that the Certificate of the Federal Power Commission be denied unless conditioned to require appellant to obtain a Necessity Certificate from the Commission before rendering service to DuPont (Supp. Stip. of Facts in Ptf's. Ex. 2, R. 109 to 111). The Federal Power Commission issued its Certificate of Convenience and Necessity for the service to DuPont "without prejudice to the authority of the Indiana Commission in the exercise of any authority it may have over the sale or service proposed to be rendered by Panhandle Eastern to DuPont" (Exs. 2-4 to Supplemental Stip. of Facts in Ptf's. Ex. 2, R. 112 to 114). At the time of the issuance of the original order of the Commission on November 21, 1945 (R. 116 to 173) the facilities for service to DuPont had been constructed but service had not yet commenced. Such service was commenced thereafter (prior to the commencement of the review proceedings in the Circuit Court of Randolph County,

Indiana, described *infra*, pp. 13-14), without applying for a Necessity Certificate from the Commission (R. 130, 131, complaint par. 14, R. 16, admitted by answer par. 1, R. 21; Ex. A to Supp. Stip. of Facts in Randolph Circuit Court, R. 190, shown admitted in evidence R. 231). The facilities used for the delivery of gas to DuPont are in all respects similar to those used for delivery to the two local utilities for resale and are also similar to those used for delivery to Anchor-Hocking and Indiana-Ohio Public Service Company (R. 176).

It was stipulated that appellant had at no time in connection with its sale to Anchor-Hocking attempted to comply with the Public Service Commission Act of Indiana (Ind. Acts 1941, Ch. 101, p. 255, Burns' Indiana Stat. Ann. 1933, Sects. 54-101 *et seq.*) with respect to filing with the Commission tariffs of rates, rules or regulations relating to the sale of gas to Anchor-Hocking, an original cost report appertaining to any of its property in Indiana, or any annual or other periodic reports. Nor has it purported to keep books, accounts, papers or records in the manner required under the orders and directions of the Commission (Stip. R. 56).

The Commission's Order of November 21, 1945

On November 21, 1945, after a hearing, the Commission entered an order which, among other things, required appellant within a period fixed in the order to (1) file with the Bureau of Tariffs of the Commission, in the form prescribed by the Commission, tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by appellant direct to ultimate consumers within the State of Indiana; (2) file annual reports on forms prescribed by the Commission for 1942 and all subsequent years so long as it continues to distribute gas direct to any

consumer in Indiana; and (3) file with the Commission copies of (a) each and all statements appertaining to its property in such form as filed by it with the Federal Power Commission under and pursuant to Order No. 73 of said Commission, adopted April 9, 1940, captioned "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts under the Natural Gas Act" and (b) each and all journal entries filed by it with said Federal Power Commission under and pursuant to the requirements of Subdivision B of Account No. 391 "Gas Plant Purchased" of the "Uniform System of Accounts Prescribed for Natural Gas Companies, subject to the provisions of the Natural Gas Act" prescribed by said commission or of Subdivision B of Account No. 392 "Gas Plant Sold" of said Uniform Classification of Accounts. The order further reserved for subsequent determination in said investigation the matter of what, if any, additional reports and information in respect of its property or operations appellant shall be required to file with the Commission (R. 172).

With reference to the service to DuPont without having secured a Necessity Certificate from the Commission under Acts 1945, Indiana, Ch. 53, p. 110, (Burns' Ind. Stat. Ann. 1933, 1945 Pocket Supp. Sect. 54-601 A, Appendix p. 67), the order provided that:

> "It is further ordered that this Commission reserve for subsequent determination in this investigation the steps, if any, to be taken by this Commission if Panhandle shall, without first securing a Necessity Certificate under the provisions of Section 97 A of the Public Service Commission Act, commence the supplying of natural gas direct to any consumer in Indiana who was not so served by it on February 26, 1945, and who is located in a rural area as defined in said Act" (R. 173).

By its terms the Act of 1945 applies only to service rendered after "the date that this section becomes effective" and consequently does not apply to the sale to Anchor-Hocking.

Review Proceedings in the Circuit Court of Randolph County, Indiana

On January 11, 1946 appellant filed proceedings in the Circuit Court of Randolph County, Indiana to vacate and set aside the Commission's order and to enjoin the enforcement thereof (R. 1). While the cause was pending, appellant filed with the Commission a written offer to furnish all information designated by the Commission's Order of November 21, 1945 on condition that the same be accepted as information only without prejudice to appellant's right to contest any subsequent assertion of regulatory jurisdiction by the Commission. In a supplemental order entered by the Commission April 9, 1946, brought into the review proceedings by supplemental complaint (R. 25) and a supplemental stipulation (R. 178 to 191, admitted in evidence, R. 231), the offer was refused on the ground that such conditional filing would not constitute compliance with the Commission's order, and it was stated that "the tariffs of rates, rules and regulations, the annual reports and the accounting information when filed, shall be deemed on file for, and be available for use by the Commission for all purposes and uses required or permitted by the provisions of the Public Service Commission Act and the rules and regulations of the Commission promulgated thereunder, including, but without limitation, the use thereof in and in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana" (R. 190, 191).

With respect to the reservation in the original order as to service to DuPont without obtaining a certificate of

necessity and convenience under the 1945 Act, the supplemental order states that:

> "If, however, Panhandle does not see fit promptly to file a petition for a Necessity Certificate under Section 97 A, the Commission proposes to proceed at the earliest date consistent with its other duties and the demands made by them upon it and its staff, with an investigation of the status of Panhandle's DuPont service in the light of Section 97 A."

On May 11, 1946, the Circuit Court of Randolph County entered judgment in favor of appellant (R. 30-31), which was reversed on appeal by the Supreme Court of Indiana (herein sometimes called "the court below") by its judgment entered February 5, 1947 (R. 196-213) from which this appeal is taken.

Necessity of Uniformity with Respect to Curtailment or Interruption of Service

Practically all sales to large industrial consumers, whether direct or through local distributing companies, are made on an interruptible basis, so that, in the event of an insufficiency of gas, such service may be reduced or cut off in order to supply what is known as "firm load," consisting of gas supplied primarily for resale to domestic and commercial consumers. (Stip. in Ptf's. Ex. 2, R. 50, R. 174). The procedure involved in cutting off part or all of the interruptible load is known in the industry as "curtailment" (R. 174). The evidence is uncontroverted that curtailment must be handled with reference to the system as a whole (R. 174, 175). Most of the pertinent facts are accurately stated in the opinion of the Supreme Court of Indiana (R. 196 to 198). That court, however, wholly ignored the evidence with reference to curtailment procedure and stated that there was nothing in the record to show that uniformity in the control of direct sales is necessary (R. 207).

The Intervening Distributing Companies

Certain Indiana public utilities purchasing gas from appellant for resale were permitted to intervene in the proceedings before the Commission and also in the review proceedings (R. 23, 121, 230) on the ground that each had a direct interest in sustaining the jurisdiction of the Commission to regulate the direct distribution and sale by appellant of natural gas to industrial consumers in Indiana, and they have actively participated throughout the proceedings. The Commission found that, if appellant should take over the industrial consumers of these local distributing companies, they would sustain substantial losses of revenue and could dispense with only a small fraction of their plant properties and that this would result in higher rates for their service to domestic and commercial users (R. 105 to 109). The Commission also found that appellant had made efforts to obtain direct sale industrial customers from the utilities and that its policy was to secure as much large industrial consumer business on or adjacent to its system as possible (R. 47 to 50). As will be apparent from the argument, appellant deems the matters so found insufficient to support state regulatory power over the interstate transactions involved, although the Supreme Court of Indiana characterized them as "a weighty consideration in balancing national interest against local need" (R. 208).

Specification of Errors

As stated *supra*, page 6, the basic issue is whether the Commerce Clause, of its own force, precludes state regulation of rates and service with respect to the direct sale and delivery, within the state attempting such regulation, to large industrial consumers, under individual contracts, of natural gas transmitted from other states by interstate pipe lines without interruption. The basic error

of the Supreme Court of Indiana is the sustaining of state regulatory authority and denial of protection of the Commerce Clause. This is specifically presented by Specifications 1, 3, 4, 5 and 25 of the Assignment of Errors (R. 222 to 227).

Other specifications of the Assignment deal with erroneous statements of law and erroneous application of legal principles made by the court below in arriving at the end result sustaining state authority which will be fully developed in the argument which follows. For a detailed itemization of such errors this Court is respectfully referred to the Assignment of Errors (R. 222-227).

Summary of Argument

1. In the last analysis the question presented is whether state regulation of the character involved in this case, is permissible, in the absence of federal regulation, under the principles stated by this Court in *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23, 64 L. Ed. 434; *East Ohio Gas Co.* v. *Tax Commission* (1931), 283 U. S. 465, 75 L. Ed. 1171, and other decisions of similar import, or is precluded by the Commerce Clause of its own force under the principles stated in *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298, 68 L. Ed. 1027; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83, 71 L. Ed. 549, and other decisions of similar import. The controlling principles are settled by the decisions of this Court but the final determination of which of such principles apply has not been made. Cf. *Arkansas-Louisiana Gas Co.* v. *Department of Public Utilities* (1938), 304 U. S. 61, 82 L. Ed. 1149.

2. Natural gas is a lawful article of commerce and its transmission from one state to another for sale and con-

sumption in the latter is interstate commerce. A state law whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of, and a prohibited interference with, interstate commerce. The legal and constitutional principles applicable to natural gas are not different from those applicable to other natural products. *Pennsylvania* v. *West Virginia* (1923), 262 U. S. 553, 596.

3. This Court has declared that the local distribution of natural gas to the public generally is local business while its transportation in interstate commerce and sale to distributing companies is not only an indivisible transaction in interstate commerce but of primary national concern which has never been subject to state regulation. Sales to industrial consumers resemble sales in local distribution only in that both sales are to ultimate consumers. In all other respects direct sales differ from sales in local distribution as widely as do sales for resale. They resemble sales to distributing companies in every respect except the anticipated use of the product by the buyer.

Sales to industrial consumers and distributing companies are made from the same source of supply under individual contracts. The product is intended to be, and is, under the same continuous movement to the point where the buyer takes delivery in one case as in the other. Delivery is made in the same manner. Both are in wholesale quantities (the amount sold to Anchor-Hocking is ten times the amount sold and delivered through the same lateral to the Indiana-Ohio Public Service Company for resale) and industrial consumer sales are as clearly "wholesale", as the term is defined in general usage (Cf. *Roland Electric Company* v. *Walling* (1946), 326 U. S. 657), as sales to distributing companies. If industrial consumer sales are to be classified as local and of primary state concern, it can be only on the ground that, regardless

of all other considerations, the use to which the purchaser intends to put the commodity sold and transported in interstate commerce determines whether such sale is entitled to the protection of the Commerce Clause. If such a constitutional principle exists this Court has not yet stated it. Cf. *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1, 24; *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 667.

4. The basic distinction to be derived from the decisions of this Court (*Public Utilities Commission* v. *Landon* (1919), 249 U. S. 236; *Pennsylvania Gas Co.* v. *Public Service Comm.* (1920), 252 U. S. 23; *Missouri ex rel., Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298; *Public Utilities Comm.* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83), is between local retail distribution of the same general character as the service performed by a local distributing company and direct sale and delivery under individual contracts in wholesale quantities. The controlling consideration is the nature of the activity of the seller rather than the use to which the commodity is to be put by the buyer. The application of this principle to the sale and delivery of natural gas is in harmony with the principles long recognized and applied by this Court to the sale and delivery of other commodities in interstate commerce. A sound analogy is that of the warehouseman who imports commodities in interstate commerce for sale. Where the commodity is imported for, and delivered to, a particular customer under contract, the transaction is interstate and national in character throughout. When the commodity is to be held for sale on demand, the commerce in its national aspect ends at the warehouse, and subsequent transactions are local. Whether in either case the commodities are sold for resale or consumption is immaterial. Cf. *Walling* v. *Jacksonville Paper Co.* (1943), 317 U. S. 564, 87 L. Ed. 460. There is no magic in the use of the word "local" in describing the customer. All

customers are of necessity "local" whether they are industrial plants or distributing companies.

5. *No valid distinction between natural gas and other* commodities can be based on the contention that natural gas is affected with a public interest and consequently subject to governmental price control. Other commodities have been held subject to price regulation by both State and Federal governments. Cf. *U. S.* v. *Rock Royal Co-operative* (1939), 307 U. S. 533, 570, 571. Any distinction on the ground stated would open the door to state regulation of the movement as well as the price of all commodities transported and sold for consumption in interstate commerce. Such a principle would be destructive of that "area of trade free from interference by the States" created by the Commerce Clause of its own force. *Freeman* v. *Hewit* (1946), 329 U. S. 249, 252.

6. The business sought to be regulated is clearly interstate commerce ending where the parties, under their individual contracts, intend the interstate movement to end, in the pipes of the consumer. (Cf. *Walling* v. *Jacksonville Paper Co.* (1943), 317 U. S. 564, 569; *Binderup* v. *Pathe Exchange* (1923), 263 U. S. 291, 309. Reduction of pressure at the time of delivery must be regarded as a mere incident in the commerce rather than its termination. (Cf. *Interstate Gas Co.* v. *Federal Power Comm.* (June 16, 1947), 91 L. Ed. (Adv. Op.) 1355, 1359; *Illinois Natural Gas Co.* v. *Cent. Ill. Pub. Serv. Co.* (1942), 284 U. S. 498, 504, 505; *State Tax Comm.* v. *Interstate Natural Gas Co.* (1931), 284 U. S. 41, 44.)

7. The orders of the Commission as construed and sanctioned by the Supreme Court of Indiana will both impede substantially the free flow of commerce from state to state and regulate phases of the national commerce which, because of the need of uniformity, demand that their regu-

lation, if any, be prescribed by a single authority. (Cf. *South. Pac. R. Co.* v. *Arizona* (1945), 325 U. S. 761, 767; *Morgan* v. *Virginia* (1946), 328 U. S. 373, 379; *Freeman* v. *Hewit*, 329 U. S. 249, 252.) The business is of paramount national concern for precisely the same reasons as the business of selling for resale. Regulation of price is not a regulation of a local aspect of the business but places a direct burden on interstate commerce inconsistent with that freedom of interstate trade which it was the purpose of the Commerce Clause to secure and preserve. *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. at p. 308; *Public Utilities Comm.* v. *Attleboro Steam & Electric Co.* (273 U. S. at p. 89). Such regulation is no less a burden when the sale is for consumption rather than resale.

8. The principle stated by this Court in *Freeman* v. *Hewit* (1946), 329 U. S. 249, 252, that attempts at state taxation have been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce, has no application to aspects of the character involved here. Regulation of a selling price is a regulation of the free flow of commerce itself and as dominant a power over commerce as the power to tax.

9. The necessity of uniformity of regulation if regulation is to be imposed is the same in the case of direct sales as sales for resale. Equality of opportunity and treatment among the various states is equally important in both. (Cf. *Missouri, ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298 at 309, 310: "Such uniformity even though it be the uniformity of governmental non-action may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned.") What one state may do may be done by others. There can be no assurance of uniformity

of treatment by the different States. The power to regulate service is necessary to effective price regulation and is authorized by the orders involved here. This would include the power of curtailment and interruption of service which can only be done with reference to the pipeline as a whole (Testimony of O. W. Morton, R. 174, 175) and endless confusion and conflict would arise between different states demanding gas. (Cf. Report No. 800, 80th Cong., 1st Session, submitted July 7, 1947 by the Committee of the House of Representatives on Interstate and Foreign Commerce with reference to amending the Natural Gas Act at p. 10.)

10. Local interest in the protection of local utilities or their customers from competition by interstate pipeline companies; or protection of local consumers of such local utilities from higher rates which might result from such competition does not warrant state regulation of the national commerce. (*Public Utilities Comm.* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83; *Baldwin* v. *Seelig* (1935), 294 U. S. 511; Cf. *Buck* v. *Kuykendall* (1925), 267 U. S. 307; *Bush & Sons Co.* v. *Maloy* (1925), 267 U. S. 317.) If there be need for regulating the commerce involved, the regulation should be sought from the body in whom the power resides. *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 600; *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 307; *Public Utilities Comm.* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83, 90.

11. The Natural Gas Act does not purport to give to the States any regulatory authority not previously possessed. Even if Congress there entertained the view that direct sales were subject to state regulation such a view unexpressed in legislation could not of itself redefine the distribution of power over interstate commerce, so as to with-

draw the bar of the Commerce Clause. But there is no conclusive evidence that Congress at the time of enacting the Natural Gas Act entertained such a view and there is abundant indication that the Supreme Court of Indiana is in error in its inference with respect to the opinion and intention of Congress. Report No. 800, 80th Cong., 1st Sess. (p. 10), submitted July 7, 1947 by the Committee on Interstate and Foreign Commerce of the House of Representatives on amending the Natural Gas Act. The Committee Report rejected amendments which would have given legislative expression to the conclusion of the Supreme Court of Indiana in this case. (Report of the Hearing before the Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess., on H. R. 2185, etc., April 14th *et seq.*, at pp. 634 to 660.) The view stated in the committee report was that "The pipe line does not occupy a utility status with reference to direct sales * * *. Competition is the proper arbiter of prices in such direct sales. * * * Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different states. * * * Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different states demanding gas as between States and the pipe lines."

12. The case is of great importance. The principles which this Court lays down in this case are certain to have a far-reaching effect not only on the natural gas industry but on many other phases of the protection of the Commerce Clause against state regulation or prohibition of the sale of other fuels and commodities in interstate commerce.

Argument

The scope of permissible state regulation and control of the interstate transportation and sale of natural gas as limited by the Commerce Clause has given rise to many important decisions of this Court. The general principles which must control the disposition of the question in this case are settled by those decisions and are not in dispute. The final determination of which of such principles apply, however, has not been made. In the last analysis the question is whether state regulation of the character involved here is permissible under the principles stated in *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23, 64 L. Ed. 434; *East Ohio Gas Co.* v. *Tax Commission* (1931), 283 U. S. 465, 75 L. Ed. 1171 and other decisions of similar import, or is precluded by the Commerce Clause of its own force under the principles stated in *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298, 68 L. Ed. 1027; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83, 71 L. Ed. 549 and other decisions of this Court. In view of the contentions of the appellees and their acceptance by the Supreme Court of Indiana it is necessary to consider (1) the general principles applicable under the decisions of this Court prior to the enactment of the Natural Gas Act and (2) the effect, if any, of such enactment.

I

Summary of Pertinent Decisions

In the early years, because the supply in certain states was known to be limited and because there was thought to be a much smaller total supply in the United States than is today considered to exist, the primary problem with reference to state control and the Commerce Clause arose from efforts of the producing states to retain this natural

resource for their own citizens and to prevent its exhaustion by transportation to other states for sale and consumption. These efforts gave rise to *West* v. *Kansas Natural Gas Co.* (1911), 221 U. S. 229, and *Pennsylvania* v. *West Virginia* (1923), 262 U. S. 553. In the former case the attempt took the form of outright prohibition of transportation out of the state. In the latter it took the more subtle form of requiring the needs of local consumers to be met before gas could be furnished to the citizens of other states. Both efforts were held to violate the Commerce Clause.

Certain basic principles bearing directly on the question presented here were stated in *Pennsylvania* v. *West Virginia*, as follows:

> "Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference" (p. 596).

It was also said that:

> "The question is an important one; for what one state may do others may; and there are ten States from which natural gas is exported for consumption in other States. Besides what may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used" (p. 596).

The process of carving out the limits of permissible regulation of sales of natural gas, transported interstate, by states in which the gas is sold commenced in *Public Utilities Commission* v. *Landon* (1919), 249 U. S. 236. It

was there held that since the interstate transportation of gas through pipelines is interstate commerce, such commerce includes the right to sell and deliver to local distributing companies free from unreasonable interference by the state, but that when the gas enters the mains of a local distributing company, the interstate movement ends and regulation of subsequent sales and deliveries belongs to the states.

One year later in *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23, this Court was required to decide whether the foregoing principle applied if the same company operated both the local distribution system and the interstate pipe line, and held that, although the entire operation constituted interstate commerce, the state could, nevertheless, in the absence of federal regulation, fix the rate at which gas was sold to local consumers. The applicability of that decision to this case is as hereinbefore stated highly important, and will be the subject of detailed consideration hereinafter. At this point in the discussion, however, it should be noted that the *Pennsylvania Gas* case neither involved nor considered the problem of direct sales in wholesale quantities to industrial consumers, under individual contracts, but dealt only with local distribution by the interstate pipe line company of the same character as that made by local distributing companies in the *Landon* case.

In 1924 the question arose whether under the doctrine of the *Landon* and *Pennsylvania Gas* cases the states, in the absence of federal regulation, could regulate the rates at which sales by interstate pipe line companies were made to local distributing companies. In *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298, it was held that the Commerce Clause of its own force precluded state regulation. This Court said that:

"The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from be-

ginning to end, and of such continuity as to amount to an established course of business, * * *" (p. 309).

and that:

"* * * enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve" (p. 308).

With reference to the *Pennsylvania Gas* case it was said that:

"The business of supplying *on demand* local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies" (p. 309).

In 1931 this Court had before it in *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, the related problem of the right of the states to tax gross receipts from sales to consumers in municipalities by a company that transmitted the gas interstate just as did Pennsylvania Gas Company. The holding was that:

"The furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state" (p. 471).

In so holding the Court noted the inconsistency between the *Pennsylvania Gas* case and its language quoted, *supra*, in *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, and

said:

"It does not appear that there were presented in Pennsylvania Gas Co. v. Public Service Commission to the state court above the considerations on which it is held that interstate commerce ends and intrastate commerce begins when gas flowing through pipe lines from outside the state passes *into local distribution systems* for delivery to consumers in the municipalities served. But however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here" (p. 472).

Whether the result in the *Pennsylvania Gas* case is finally considered to rest on the view that the business involved is local in character notwithstanding it is interstate commerce, or that interstate commerce is not involved at all, is not entirely clear from later decisions of the Court. *Illinois Nat. Gas Co.* v. *Cent. Ill. Public Service Co.* (1942), 314 U. S. 498, 504, 505; *Memphis Natural Gas Co.* v. *Beeler* (1942), 315 U. S. 649, 653. In either event, appellant does not question the result reached in those cases. The vital question is whether the principle there stated applies to that portion of appellant's business which the State of Indiana seeks to regulate.

That question was first presented to any court in *Sioux City* v. *Missouri Valley Pipeline Co.* (N. D. Ia. 1931), 46 F. (2d) 819, in which it was sought to enjoin a pipe line company from transporting natural gas from Nebraska into Iowa to supply two large packing plants in Sioux City. The contentions of the parties are stated in the opinion as follows:

"... the city contends that the sale of natural gas to any consumer within the city limits is subject to municipal regulation under the laws of the State of Iowa and requires a franchise from the city. On the contrary, the pipe line company contends that its

transportation from the state of Nebraska through its proposed pipe line to the plants of Armour & Company and the Cudahy Packing Company, and the sale of such gas to said companies is a single and indivisible act of interstate commerce, and that to require the pipe line company to take a franchise and submit to municipal regulation would be a direct burden on interstate commerce" (p. 822).

The court held:

1. That the transaction was clearly interstate commerce and not subject to local regulation.

2. That the *Landon* and *Pennsylvania Gas* cases did not apply because:

   (a) In those cases the pipe line companies had undertaken to furnish public gas service to the citizens generally of municipalities. They were not performing particular contracts but were holding themselves out to serve all applicants. The service was general and of a common character meeting the demand of domestic use and local consumers of other classes.

   (b) Service to the packing companies was not comparable to a general service to all the inhabitants of a city because the packing companies required a supply wholly beyond comparison with ordinary consumers and no general rule applicable to the public would meet their requirements or necessities.

In 1933 the Public Utilities Commission of Colorado determined that it had no jurisdiction to regulate the direct sales to industrial consumers of Colorado Interstate Gas Co. (*Re Colorado Interstate Gas Company*, P. U. R. 1933 E 349). The Commission was unable to see any reason

for applying a different principle to sales to industrial consumers from that applied by this Court in the *Barrett* case to sales to local distributing companies for resale. The *Pennsylvania Gas Company* and *East Ohio Gas Company* cases were distinguished on the ground that they involved the business of supplying gas generally to the inhabitants of municipalities rather than direct deliveries to specific consumers under contract. The argument was made that the direct sales should be regarded as local because pressure was reduced at the point of delivery but the Colorado Commission noted that this differed in no respect from the reduction of pressure made to deliver to companies engaged in local distribution and pointed out that this Court had already held in *State Tax Comm.* v. *Interstate Natural Gas Co.* (1931), 284 U. S. 41, that such reduction was a mere incident of delivery which does not deprive sales to distributing companies of their interstate character. The Commission saw no reason for a distinction in this respect based solely on whether the sales were made for consumption or resale.

In *State ex rel. Cities Service Company* v. *Public Service Commission* (1935), 337 Mo. 809, 85 S. W. (2d) 890, the Supreme Court of Missouri held that the Missouri Public Service Commission had no jurisdiction over the business of an interstate pipe line company serving twelve industrial consumers in the state. It held that there was no essential difference between selling, transporting, and delivering to an industrial consumer under contract and selling and delivering in the same manner to a local distributing company, and that the applicable principles were those stated and applied by this Court in the *Barrett* case rather than in the *Pennsylvania Gas* case. This Court denied certiorari (296 U. S. 657).

In 1937 this Court decided *Southern Nat. Gas Corp.* v. *Alabama*, 301 U. S. 148. In that case a pipe line company maintained its office and principal place of business in

Birmingham, Alabama, where the entire management and control of the business were lodged. It had contracts in Alabama for the delivery of gas to three distributing companies and to an industrial consumer which purchased for itself and a number of separate plants operated by affiliated companies. Sales to the industrial consumers were made from time to time on orders given by the Birmingham office as the needs of the purchasers required. Although recognizing that the facts of the two cases were not the same, this Court said that there was an analogy to the situation in the *East Ohio Gas* case and distinguished *State Tax Comm. v. Interstate Nat. Gas Co.* (1931), 284 U. S. 41, 76 L. Ed. 156 (denying that reduction of pressure alone terminated interstate movement) saying that:

> "There were no such local activities as are present here to carry the transactions of the company into the field of state authority" (p. 156).

Whatever the local activity there referred to, it is indisputable on the record in this case that there is no element of local activity in connection with the sales to Anchor-Hocking and DuPont not equally present in appellant's sales to local distributing companies. The Supreme Court of Indiana so recognized saying:

> "Such sales and deliveries are, so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers. For example, gas for Anchor-Hocking and gas for the Indiana-Ohio Company, the distributing utility serving the City of Winchester, and other towns thereabout, leave the main line through the same lateral, and at identical pressures. In fact they are inseparably a part of the same flow. This common flow continues until the lateral divides close to points of delivery to Anchor-Hocking and the Indiana-Ohio

Company. As has already been shown, the pressures there, while not exactly the same to each, are substantially the same. If the segregation and reduced pressure for delivery to the Indiana-Ohio Company do not make such transactions intrastate commerce under the 'broken package' theory, we cannot very consistently apply the 'broken package' theory to almost identical deliveries to Anchor-Hocking" (R. 201).

Any distinction between the two types of sales must be sought solely in the disposition the buyer intends to make of the commodity purchased. As hereinafter more fully discussed no such distinction has been recognized by this Court with reference to the sale and delivery in interstate commerce of commodities other than natural gas and no sound principle of law supports such a distinction.

In *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.* (1942), 314 U. S. 498, 506, 86 L. Ed. 371, 376 this Court said:

> "In Southern Natural Gas Corporation v. Alabama (1937), 301 U. S. 148, 156, 167, 81 L. Ed. 970, 976, 57 S. Ct. 699, on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business within the state measured by all of the taxpayers' property located there, including that used for wholesale distribution to local public service companies."

The last decision of this Court bearing on any phase of the problem presented, prior to the enactment in 1938 of the Natural Gas Act, was *Arkansas-Louisiana Gas Co.* v. *Department of Public Utilities* (1938), 304 U. S. 61, 82 L. Ed. 1149. In that case the pipe line company not only sold to distributing companies for resale, and to industrial consumers direct, as does the appellant in Indiana, but also

sold to local consumers through the operation of local distributing systems in various Arkansas towns. It was thus admittedly a public utility subject to the regulatory jurisdiction of the state commission regardless of whether its direct sales were so subject. The Arkansas Commission ordered the pipe line company to file copies of its contracts, rates and regulations for sales to its industrial consumers. In holding that the order required only the furnishing of information which would not unduly burden interstate commerce, this Court pointed out that since the pipeline company was operating locally it might be highly important for the state authorities to have information concerning all of its operations. It further said, however:

> "In case the Department undertakes by some future action to impose what may be deemed unreasonable restraint or burden upon appellant's interstate business through rate regulation or otherwise that may be contested" (pp. 63, 64).

Appellees have contended that by the foregoing language this Court meant to say only that the pipe line company would be entitled to future protection from *unreasonable* rate regulation. But the protection referred to was in connection with the Commerce Clause and not the 14th Amendment. In any event that case clearly left open for future determination the question presented here. As heretofore pointed out (ante, p. 13) the Commission in this case refused to accept filing of matters specified in its order as information only, and the Supreme Court of Indiana specifically construed its action as presenting for decision the issue of regulatory jurisdiction under principles announced by this Court in *Public Utilities Commission* v. *United Fuel Gas Company* (1943), 317 U. S. 456, 87 L. Ed. 396 (R. 199, 200).

Shortly after the *Arkansas-Louisiana Gas Co.* decision, the Federal Natural Gas Act (15 U. S. C. A., Sec. 717) was enacted, by which the Federal Power Commission was

given jurisdiction of the interstate transportation of natural gas and of interstate sales for resale. Appellant's position as to that Act, more fully developed hereinafter, is that it added nothing to state regulatory authority but did express the policy of Congress that interstate sales of natural gas by natural-gas companies directly to large industries should not be subjected to regulation.

Since the Arkansas-Louisiana decision, this Court has had no opportunity to consider the issue in this case, although sales to industrial consumers were indirectly involved in *Colorado Interstate Gas Co.* v. *Federal Power Commission* (1945), 324 U. S. 581, 89 L. Ed. 1206, and *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission* (1945), 324 U. S. 635, 89 L. Ed. 1241. Primarily these cases involved rates for sales for resale, and sales to industrial consumers were involved only because of the question of allocating to those sales some portion of the value of the property used for both types of sales. The *Colorado Interstate* case also involved the question of whether sales for resale to Industrial consumers were sales for "ultimate distribution to the public" within the meaning of the Natural Gas Act. In the latter case the Court referred to intrastate sales, interstate transportation and sales to industrial consumers, and interstate transportation to distributing companies for resale, as constituting three separate phases of the business and in the *Panhandle Eastern* case referred to the direct sales as "unregulated business • • • at prices fixed in competition with other fuels." No issue of state regulatory authority was involved.

In 1940, after the enactment of the Natural Gas Act, a three-judge federal district court, as noted by this Court in *Interstate Natural Gas Co.* v. *Federal Power Commission*, (June 16, 1947), 91 L. Ed. (Adv. op.) 1355, 1358, enjoined the Louisiana Public Service Commission from asserting jurisdiction over the business of a pipeline company which sold gas transported from outside the state to in-

dustrial consumers as well as distributing companies, on the ground that the business was interstate commerce. *Interstate Nat. Gas Co.* v. *La. Pub. Serv. Comm.* (E. D. La. 1940), 34 F. Supp. 980.

In 1945 the Sixth Circuit Court of Appeals had occasion to refer to the question in *Columbia Gas & Electric Corporation* v. *U. S.*, 151 F. (2d) 461, 463-464, 468. In contrasting the operation of *Columbia* and its subsidiaries, with that of *American Fuel* and its subsidiaries, the court noted that the former served both domestic and industrial consumers and thus were public utilities subject to the rules and regulations of state public utility commissions, whereas the latter served only industrial users under private agreements, and were, thus, immune from municipal and state regulation. It was further noted that, as a result, *American Fuel* had a substantial competitive advantage over *Columbia* which had enabled it to take from the subsidiaries of the latter some of their large industrial customers.

It is apparent from the record in this case and the opinion of the Supreme Court of Indiana that the primary result sought here is a method of curtailing appellant's industrial consumer business rather than the protection of its customers against unreasonable rates or inadequate service. No industrial consumer has sought to intervene to complain about either. In determining that local interest outweighs national interest and justifies state regulation of interstate sales to industrial consumers, the court below specifically stated that, if the state is unable to regulate the direct sales of interstate pipe lines, the result will be to give both the pipe line companies and their customers competitive advantages over regulated local utilities and their customers which will result in higher rates to all customers of the local utilities. As will be more fully developed hereinafter, appellant insists that any consideration of local interest of this character as a basis for

sustaining local regulation of interstate commerce is directly at variance with principles long stated and followed by this Court.

II

Principles to be Applied

Among the principles derived from the foregoing decisions of this Court which must be applied here are the following:

1. Natural gas is a commodity and a lawful article of commerce. In determining the application of the Commerce Clause, and the limits of state and national jurisdiction, the principles applied are precisely the same as those which have long been established in other fields of interstate commerce with reference to other commodities. There is nowhere in the decisions of this Court any support for the view that ordinarily accepted legal and constitutional principles are to be discarded when the commodity dealt with is natural gas.

2. The local distribution of natural gas to the public generally is local business subject to state regulation even though the gas has been transported in interstate commerce and regardless of whether the local distributor is an independent company or the company that also transports the gas.

3. The transportation of gas in interstate commerce and its sale to distributing companies is not only an indivisible transaction in interstate commerce but of primary national concern and the states have at no time possessed authority to regulate rates for such sales or otherwise to interfere with, or to obstruct, the commerce.

In determining the principle applicable here, it is necessary to examine the likenesses of, and the differences be-

tween, sales of the character involved here, sales of the character generally described as local distribution, and sales to distributing companies for resale. On the record in this case, it is clear that sales to industrial consumers resemble the sales generally described as local distribution only in that both are to the ultimate consumer. In all other respects they differ from such sales as widely as do sales to distributing companies. On the other hand, they differ from the latter only with reference to the anticipated use of the product by the buyer.

Sales to industrial consumers and to distributing companies are made from the same source of supply under individual contracts. The product is intended to be, and is, under the identical continuous movement in one case as in the other. The transportation is as interstate with reference to one as the other. Both are in wholesale quantities. The volume sold and delivered to Anchor-Hocking is ten times the quantity sold to Indiana-Ohio Public Service Company for distribution to local consumers (Stip. R. 35, 36). Industrial consumer sales are as clearly "wholesale", as the term is defined in general usage (*Roland Electric Company* v. *Walling* (1946), 326 U. S. 657, 673, 90 L. Ed. 383, 392) as the sales to distributing companies.

The sale to Indiana-Ohio Public Service Company through the Winchester lateral, is indisputably an interstate sale of paramount national rather than local concern, which the State of Indiana has always been barred from regulating for the reason that uniform regulation from a single source is required if any governmental regulation is to be imposed (*Missouri ex rel Barrett* v. *Kansas Natural Gas Co., supra*). If the sale and delivery to Anchor-Hocking in substantially the identical manner is to be classified as one of primary local concern to the State of Indiana, it can be only on the ground that, regardless of all other considerations, the use to which the purchaser intends to

put a commodity sold and transported in interstate commerce determines whether such sale is entitled to the protection of the Commerce Clause.

If such a constitutional principle exists, this Court has not yet stated it. In *Schollenberger* v. *Pennsylvania* (1898), 171 U. S. 1, it was contended that, although wholesale sales of oleomargarine in interstate commerce were protected from state interference, sales to consumers were not so protected. This Court said (p. 24):

> "We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade, or one at retail to a consumer."

In *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652 involving the right of a state to impose a property tax on materials imported for manufacture, it was said (p. 667):

> "We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale."

The decision by the Supreme Court of Indiana in this case (aside from its view as to the effect of the Natural Gas Act) is based principally on its conclusion that "the result in the *Pennsylvania Gas Co.*, case was predicated largely upon the fact that the sales involved were to consumers" (R. 209). In this connection the court below quoted the following language from *Missouri ex rel., Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 309:

> "In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized

in the Landon Case. The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance * * *."

Comparing the *Landon* case and the *Pennsylvania Gas Co.* case, the court below said (R. 209):

"By this language the Supreme Court of the United States seems to us to indicate that the test is whether or not local business is involved and that supplying local consumers is a local business. * * * In the case before us the sales are and will be to local customers for their own consumption. Therefore, paraphrasing the language quoted, the local interest is paramount and interference with interstate commerce, if any, is of minor importance and permissible."

It is only necessary to consider the language quoted from the *Barrett* case to demonstrate the fallacy of the conclusion. What things done by the appellant in this case are local and done after the business in its essentially national aspect have come to an end? What appellant does in delivering to Anchor-Hocking is precisely what it does in delivering to Indiana-Ohio Public Service Company. The business in its essentially national aspect comes to an end at precisely the same point in each case and appellant does nothing thereafter. It is perfectly clear that this is not the kind of business that this Court was characterizing as local business in the *Barrett* case. Immediately before language quoted by the court below, this Court

said in the *Barrett* case, with reference to the *Pennsylvania Gas Co.* case:

> "The commodity after reaching the point of distribution in New York was subdivided and sold at retail. The Landon case, so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on not by the Supply Company, but by independent distributing companies."

The business characterized as local in the *Barrett* case was not the mere sale for consumption but "the *process* of *division* and sale" and the "business of supplying *on demand*". In this case no process of *division* and sale to consumers is carried on and appellant is not in the business of supplying local consumers on demand. In *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, (1927), 273 U. S. 83, 71 L. Ed. 549, the controlling question was stated to be whether the rule of the *Pennsylvania Gas Co.*, case or that of the *Barrett* case applied to the right of the Rhode Island Commission to regulate the rate at which a utility of that state furnished electricity to a Massachusetts distributing company under contract. In distinguishing the *Pennsylvania Gas Co.* case, this Court pointed out that, in that case, the gas was brought from Pennsylvania to a distribution point in a city in New York where it was subdivided and sold to local consumers at retail in substantially the same manner as the service would have been rendered by a local plant furnishing gas to consumers in a city. No implication can be gathered from the language used in the *Attleboro* case that the distinction turned solely on the question of whether the purchasers were consumers or retailers.

This Court also said in the *Barrett* case (pp. 309, 310):

> "The transportation, sale, and delivery constitutes an unbroken chain, fundamentally interstate from

> beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national—admitting of and requiring uniformity of regulation."

The transportation, sale and delivery to appellant's industrial consumers equally constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The proper distinction to be derived from the *Barrett* and *Attleboro* cases is between local *distribution* to consumers and direct sale and delivery under contract, whether for consumption or resale. The controlling consideration indicated is the character of the activity of the seller rather than the use to which the commodity is to be put by the buyer. The application of this principle to the sale and delivery of natural gas is in harmony with the principles long recognized by this Court with reference to the sale and delivery of other commodities in interstate commerce, whereas the conclusion imputed to this Court by the court below is entirely inconsistent with such principles as well as with the language of this Court upon which it relies.

A sound analogy is that of the warehouseman who imports commodities in interstate commerce for sale. This Court held in *Walling* v. *Jacksonville Paper Co.* (1943), 317 U. S. 564, 87 L. Ed. 460 that, where the commodity is imported for and delivered to a particular customer under contract, the transaction continues to be interstate throughout. Conversely, when the commodity is to be held for sale on demand, the commerce in its national aspect ends at the warehouse, and subsequent transactions are local. In neither case does the question of whether the sale is local or national turn on whether the purchaser of the goods from the warehouse intends to resell or consume them. There is no magic in the use of the word "local" in describing the customer. All customers are of neces-

sity local whether they are industrial plants or distributing companies.

The appellees may contend in this Court, as they have in the lower courts, that the principles applicable to the sale and delivery of other commodities are not applicable to natural gas because it is affected with a public interest and therefore amenable to governmental price regulation. Granting that this is so, other commodities have been held subject to price regulation both by state and federal governments (Cf. *U. S.* v. *Rock Royal Cooperative* (1939), 307 U. S. 533, 570, 571). If, therefore, a distinction is predicated on that ground, the door is opened for price regulation of all such commodities by the states in which they are sold after being transported from other states, regardless of the Commerce Clause, provided only that they are sold for consumption rather than resale. The sanction of such a principle would clearly be destructive of that "area of trade free from interference by the States created by the Commerce Clause of its own force." *Freeman* v. *Hewit* (1946), 329 U. S. 249, 252.

The result reached in the Supreme Court of Indiana cannot be sustained on the bare ground, there asserted, that all sales for consumption are *ipso facto* local and therefore subject to state regulation. There is no sound basis for the application to natural gas of a principle different from that applied to the sale and delivery of other commodities in interstate commerce.

III

The Business Sought to be Regulated is Interstate Commerce

The Supreme Court of Indiana substantially conceded that the business here sought to be regulated is interstate commerce but decided that it was, nevertheless, of paramount local interest and consequently subject to state

regulation regardless of its interstate character. Its concession of the interstate character of the sales was compelled by the recognition that there is no logical basis for holding that, although appellant's sales and deliveries to Indiana-Ohio Public Service Company and other local distributing companies served by its laterals are admittedly interstate commerce, its substantially identical sales and deliveries to Anchor-Hocking and DuPont are intrastate. The appellees, however, may continue to contend the contrary. The only argument which has ever been advanced in support of the claim that sales to industrial consumers constitute intrastate commerce is based on the reduction of pressure at the time of delivery, but there is no legal or logical basis for the contention that such reduction terminates the interstate movement only if the purchase is for consumption but not if it is for resale. In *Interstate Natural Gas Co.* v. *Federal Power Comm.* (June 16, 1947) 91 L. Ed. (Adv. op.) 1355, 1359, this Court rejected the contention that the interstate movement should be regarded as beginning when the gas, theretofore moving through the line at well-pressure, was subjected to increased pressure in the compressor stations of the purchasing companies in order that it might be moved to distant markets, saying that the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin. By parity of reasoning the reduction of pressure at the meter-house at the time of delivery to the industrial consumers must be regarded as merely an incident in the interstate commerce rather than as its termination. This Court has so held with reference to reduction of pressure in delivering to distributing companies for resale. *State Tax Comm.* v. *Interstate Natural Gas Company*, 284 U. S. 41, 44, or to another pipeline company for delivery to distributing companies, *Illinois Natural Gas Co.* v. *Cent. Illinois Pub. Service Co.*, 314 U. S. 498, 504, 505. If, as stated in *Colorado-*

Wyoming Gas Co. v. *Federal Power Comm.*, 324 U. S. 626, 631, "That commerce does not end until the gas enters the service pipes of the distributing company," there can be no basis for the contention that it ends in the meter-house if the purchase is for consumption. The intention of the parties as to the point where the parties originally intended that the interstate movement should terminate (*Walling* v. *Jacksonville Paper Co.* (1943), 317 U. S. 564, 569; *Binderup* v. *Pathe Exchange* (1923), 263 U. S. 291, 309) is the same in both transactions.

IV

The Business is of Paramount National Concern and Requires Uniform Regulation by a Single Authority if Regulation is to be Imposed

In holding that, regardless of its character as interstate commerce, the business sought to be regulated is subject to state regulation on the ground that it is so local in its nature and implications that local needs outweigh national interest and that it is not of such character as to require uniform regulation on a national basis, the court below has misapplied certain principles long recognized by this Court and recently stated in *Southern Pac. R. Co.* v. *Arizona* (1945), 325 U. S. 761; *Morgan* v. *Virginia* (1946), 328 U. S. 373; and *Freeman* v. *Hewit* (1946) 329 U. S. 249. The principles, there stated, which the court below misapplied are that:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority" (Southern Pac. Co. v. Arizona, 325 U. S. 761, 767).
>
> "* * * where Congress has not acted and although the state statute affects interstate commerce, a state

may validly enact legislation which has predominantly only a local influence on the course of commerce" (Morgan v. Virginia, 328 U. S. 373, 378).

"But in the necessary accommodation between local needs and the over-riding requirement of freedom for the national commerce, the incidence of a particular type of state action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State" (Freeman v. Hewit, 329 U. S. 249, 253).

The court below did not comprehend the controlling effect here of other principles, fundamental in character, restated in those cases, namely:

"But ever since Gibbons v. Ogden, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." (Southern Pac. R. Co. v. Arizona, 325 U. S. 761, 767.)

"It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce." (Morgan v. Virginia, 328 U. S. 373, 378.)

"A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of commerce between States." (Freeman v. Hewit, 329 U. S. 249, 252.)

This Court is, of course, the final arbiter of the competing demands of state and national interest. *Southern Pac.*

Co. v. *Arizona*, 325 U. S. 761, 769; *Morgan* v. *Virginia*, 328 U. S. 373, 380. The orders of the Commission under review here, as construed and sanctioned by the Supreme Court of Indiana, will both impede substantially the free flow of commerce from state to state and regulate phases of the national commerce which, because of the need of uniformity, demand that their regulation, if any, be prescribed by a single authority.

The position of the court below that the business is local, and consequently subject to local regulation in all phases, because the sales are to consumers has been hereinbefore considered (ante, pp. 36 to 41). This would apply to natural gas a principle not recognized as to other commodities sold and delivered in interstate commerce and unjustified by any language of this Court in the decisions relied on to support it. Unless such a distinction is valid, the business sought to be regulated is essentially national in character for the same reasons as the business of sales for resale, and the principles heretofore applied by this Court to the latter sales are controlling rather than the principles applied to local distribution in the *Pennsylvania Gas Co.* case.

Price regulation is plainly not regulation of a local aspect of interstate commerce. As stated in *Missouri ex rel. Barrett* v. *Kansas* (265 U. S. 298 at 308):

> "But the sale and delivery here is an inseparable part of a transaction in interstate commerce,—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such interstate commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve."

And in *Public Utilities Commission* v. *Attleboro Steam & Electric Company* (273 U. S. 83 at p. 89), it was said that

the order of the state commission was "a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce" and that "being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose."

If the regulation of a selling price directly burdens interstate commerce where the purchase is for resale, by what legerdemain of logic does it become less of a burden when the purchase is for consumption? Could it be seriously contended that regulation by the states of the selling price of coal or oil, transported from other states, to industrial consumers under contract, would impose no burden on interstate commerce and that such interference would be "of minor importance and permissible"? Yet what objection can there be to such a result if this decision is permitted to stand? Surely, it can not be shown that the principles applicable to other commodities have no application to the interstate sale of natural gas and that what would be concededly business of national concern as to other commodities is merely local business if the commodity is natural gas.

The court below cites the statement of this Court in *Freeman* v. *Hewit*, 329 U. S. 249, 252, to the effect that attempts at state taxation of interstate commerce have been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce and says:

> "This leniency toward the police power as compared with the taxing power of the states inures to the benefit of the appellants in the case before us, not only in considering the merits of the differences involved but in weighing the value of the decided cases as precedents" (R. 210).

But this Court obviously had reference to those local aspects of commerce with which police power has been traditionally concerned. Regulation of the selling price is a regulation of the free flow of commerce itself and the power to regulate price is just as clearly a dominant power over commerce as is the power to tax. The principle stated in the *Hewit* case with reference to police power regulation of local aspects of commerce has no application to the regulation involved here unless the principle is adopted that all sales to consumers are local aspects of commerce.

With reference to the necessity of uniformity if price is to be regulated, this Court said in *Missouri, ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 309, with reference to the business of selling to local distributing companies:

> "The paramount interest is not local but national, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned."

There is no valid distinction in this respect between sales to distribuing companies for resale and sales to industrial plants for consumption. Equality of opportunity and treatment among the various communities and states is equally important in both types of sales. What one state may do may be done by others and, while each state would be precluded by the 14th Amendment from imposing confiscatory rates, there would be no other limitation even tending to secure uniformity. There could be as many prices as there are states traversed by a pipeline. The question of available supply of necessity enters into price. In order to effectuate price control in any state the right to compel a supply at the price fixed is

essential. Otherwise, the supply would naturally go to states permitting better prices, or imposing no regulation. These considerations are precisely the same whether the gas is furnished for industrial consumption or resale. But the matter of compelling the furnishing of a supply is plainly one where the interest of each state would conflict. This leads to the question of the assertion in the orders involved here of jurisdiction to regulate service to industrial consumers.

The orders do not presently purport to impose regulation on appellant's service. The opinion of the court below, however, clearly indicates what may reasonably be regarded as in prospect in this respect. One admitted purpose of the regulation is to neutralize any competitive advantages appellant or its customers may have over local utilities and their customers (R. 208). The court below also refers to Indiana Acts of 1945, Ch. 53, p. 110 (R. 211) requiring a Certificate of Convenience and Necessity from the Commission in order to serve industrial consumers direct. The orders of the Commission, as heretofore stated, threaten enforcement of this statute with reference to the service to DuPont, for which appellant has a Certificate of Convenience and Necessity from the Federal Power Commission. The right of a state to require such a certificate in order to engage in interstate commerce was denied by this Court in *Buck* v. *Kuykendall* (1925), 267 U. S. 307, and *Bush & Sons Co.* v. *Maloy* (1925), 267 U. S. 317.

On the other hand, the opinion of the court below states that appellant is a public utility subject to control of the Indiana Public Service Commission under Sec. 54-105, Burns' Ind. Ann. Stat. 1933, which defines a public utility to be "* * * every corporation * * * that now or hereafter may own, operate or control any * * * plant or equipment * * * for the * * * transmission, de-

livery or furnishing of heat, light, water or power • • • either directly or indirectly to or for the public" (R. 211).

In arriving at this conclusion, the court below says that appellant is admittedly "selling gas in Indiana indirectly to and for the public through distributing companies and that makes it a public utility under the Indiana statute, subject to regulation and control by the Indiana Public Service Commission (R 211). In view of the fact that the court below, elsewhere in its opinion, indicates a knowledge of the existence of the Natural Gas Act and the pertinent decisions of this Court both prior and subsequent to that Act,[4] it is difficult, if not impossible, to understand how the court below could have actually reached the conclusion that the business of selling natural gas to distributing companies, over which the state has never possessed jurisdiction, could of itself subject appellant to the regulatory jurisdiction of the Commission. This point was specifically called to the attention of the court below in appellant's petition for rehearing (Specs. 21, 22, 23, R. 218) but the petition was denied without change in the opinion (R 220).

More important, with respect to the question presented here, however, is the conclusion of the court below that as a public utility, appellant will be obligated to serve all who apply and will not be permitted to select its customers. If this is true in Indiana, it is also true in each of the several states in which appellant operates. It is inconceivable that regulation of this character can fail to bring about not only conflicts between the states but conflicts between the states and the Federal Power Commission.

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[4] *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298; *Peoples Natural Gas Co. v. Public Service Commission* (1926), 270 U. S. 550; *State Corp. Comm. v. Wichita Gas Co.* (1934), 290 U. S. 561, 563; *Illinois Natural Gas Co. v. Central Illinois Public Service Company* (1942), 314 U. S. 498, and *Public Utilities Commission v. United Fuel Gas Co.* (1943), 317 U. S. 456.

As shown by the record (ante, p. 14) substantially all industrial consumers' contracts are on an interruptible basis and the service is curtailed when the supply would be insufficient to supply the firm commitments of local distributing companies for domestic and commercial customers. There is uncontroverted evidence that any curtailment program must be based on the operation of the pipeline system as an entirety (R. 174, 175). Moreover the provisions of the Natural Gas Act giving the Federal Power Commission jurisdiction over the construction of facilities for the interstate transportation of natural gas make it extremely doubtful whether appellant could, if ordered to do so by a state commission, enlarge its interstate transportation facilities in order to serve new industrial customers without authorization from the Federal Power Commission. (As stated ante, p. 10, such a certificate was applied for and issued with reference to the DuPont service over the objection of the appellee Commission.)

The Federal Power Commission has also asserted the right to prevent a pipe line company from serving new customers, even though additional transportation facilities are not required if that Commission determines that such service would impair ability to render satisfactory service to existing customers. In its opinion No. 130 issued March 14, 1946, "In the matter of Panhandle Eastern Pipe Line Company and Michigan Consolidated Gas Company" in Docket No. G-688 (63 P. U. R. (N. S.) 313) that Commission said (p. 220):

> "Therefore, it is our view that where, as here, a company has not the capacity to sell a large quantity of gas to a new customer without imparing its ability to render satisfactory service to existing customers, it is the duty of the Commission in protecting the interest of the public to prevent such company from using the facilities subject to its jurisdiction for such purpose."

That the conflicts suggested are not purely conjectural is fully supported by Report No. 800, 80th Cong., 1st Sess., submitted July 7, 1947 by the Committee of the House of Representatives on Interstate and Foreign Commerce with reference to amending the Natural Gas Act. This report is of great importance in connection with the effect of the enactment of the Natural Gas Act on the question involved here and will be further referred to in that connection. It is also important, in connection with the question of whether uniform regulation of direct sales is necessary, if any regulation is to be imposed.

As background for an understanding of the full significance of this report, it should be noted that, as shown by the report of the "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives (80th Cong., 1st Sess., April 14 to 18 and May 28 and 29, 1947) on H. R. 2185, H. R. 2235, H. R. 2292, H. R. 2956 at pp. 634 to 660 of said report the National Association of Railroad and Utility Commissioners proposed an amendment (p. 641) specifically described as following the language of the McCarran Act, so far as it relates to regulation, which would definitely have authorized State regulation of sales of the character involved in this case.

The Report at page 10 states:

> "The bill makes no change in the present law as to direct sales by pipe lines to indu trial consumers, which sales, under the Natural Gas Act, are exempt from Federal Power Commission jurisdiction. Your committee feels that no change is necessary in the public interest.
>
> "Your committee has considered the amendment offered by the National Association of Railroad and Utility Commissioners, proposing to permit the various States to exercise jurisdiction over direct sales, and has concluded that the adoption of the amend-

ment would not be in the public interest but would be more likely to add to the existing confusion.

"The pipe line does not occupy a utility status with reference to direct sales. By the regulation of the utilities which serve him, the small consumer who goes about his day's work is protected from exorbitant rates, but direct sales are made to businesses, factories, etc. They are sales at arm's length. The purchaser is engaged in the business of securing fuel at the lowest possible price. He is his own protection. He does not need the aid of a regulating authority. Competition is the proper arbiter of prices in such direct sales. As in other businesses under our competitive system of free enterprise, this problem should be left to the businessmen themselves, to the pipe lines and their customers. They know the business and deal with each other on a fair-bargaining basis.

"Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different States. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its effect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different States demanding gas as between States and the pipe lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction

as against the demands of the States to regulate prices, to interrupt service and to curtail service.

"It is not necessary to exercise regulatory controls over direct sales in order to assure adequate service to the utility consumers. With the amendment made by section 6 of the bill there will be no doubt as to the power of the Commission to compel a pipe line to render good service for sales under the Commission's jurisdiction."

While the Committee report takes the view that no regulation of direct sales is required, it also supports the position, contrary to the assumption of the court below, that such sales are phases of the national commerce which because of the need of national uniformity demand that their regulation, if any, be prescribed by a single authority, and not by the several States. If so, State regulation is precluded by the Commerce Clause of its own force.

V

Local interest in the protection of local utilities or their customers from competition by interstate pipeline companies or their local consumers from higher rates as a result of such competition does not authorize local regulation

The court below held that a weighty consideration, in balancing national interest against local need, was the local interest in protecting local distributing companies from pipeline company competition for industrial consumer business in order to protect local consumers from higher rates which would be necessitated by a reduced volume of industrial consumer business for local companies, and in protecting customers of the local utilities from disadvantages which would be suffered if customers

of the pipeline companies were given more favorable rates or service. This Court has never recognized local interest of the character asserted as a basis for local regulation of interstate commerce and has several times rejected similar contentions.

In *Public Utilities Commission* v. *Attleboro Steam & Electric Company*, (1927), 273 U. S. 83 the local interest argument was that inability of the Rhode Island Commission to fix a higher rate for the local company's sale of power to the Massachusetts company than that fixed by contract, imposed an unreasonable rate burden on Rhode Island consumers and impaired the regulatory functions of the appellant Commission. This Court, at p. 90 said:

> "Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests;".

State efforts to regulate rates of sales for resale of natural gas transported in interstate commerce were sought to be predicated on local interest in regulating

rates of distributing companies which was handicapped because of the floor established by the wholesale rates. This Court said in *Missouri, ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 308:

> "The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation."

Protection of local concerns from competition from interstate commerce was denied as a basis for regulation in *Baldwin* v. *Seelig*, 294 U. S. 511, 527. This Court said:

> "Neither the power to tax nor the police may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents."

And in *Freeman* v. *Hewitt*, 329 U. S. 249, 252 it was said that:

> "These principles of limitation on state power apply to all state policy no matter what State interest gives rise to its legislation."

It is no answer to say, as does the court below (R. 208) that, unless state regulation is permissible, appellant's direct sales to industrial consumers will be unregulated. As this Court said in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 600:

> "If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in whom the power resides."

Actually, there is no discernible relation between regulation of appellant's rates and service and the protection of local utilities from competition which it is claimed would result in higher rates for local consumers. This objective can be achieved only by excluding appellant and other interstate pipeline companies from making sales direct to industrial consumers, since it cannot be assumed that regulation, if permissible under the Commerce Clause, could be made confiscatory for the purpose of discouraging continuation or expansion of the business. The real objective sought to be accomplished by the local utilities and the state commission is plainly stated in the memorandum submitted by the advisory counsel for the National Association of Railroad and Utility Commissioners in the "Hearings of the Committee on Interstate and Foreign Commerce, House of Representatives" (80th Cong., 1st Sess., April 14, 1947 *et seq.*) on H. R. 2185, H. R. 2235 H. R. 2292, H. R. 2569, and H. R. 2956, which appears in the report of those hearings at pages 640 *et seq.* At page 644 the following statement is made:

> "To exempt industrial sales of interstate gas from State regulation would disorganize State regulation, and would open the local field to the unregulated raids of unlicensed interstate pipeline companies, which would skim off the cream of the business of local companies, represented by sales to large industrial users, and would leave the general rate-paying public, who must support the local companies, to absorb and bear the resulting loss of revenue from that business."

Clearly this objective presents not a local problem, but a far-reaching issue of national policy. If sound national policy requires that the States should have the right to exclude interstate pipe line companies from, or restrict them in, the field of direct sales to industrial consumers

for the protection of local utilities and their customers. Congress can say so whenever it chooses but, under constitutional principles which have stood the test of time, its silence should not be construed to permit the adoption and enforcement of such a policy by the States.

VI

The Natural Gas Act

The Natural Gas Act excludes direct sales to consumers from its regulatory provisions, although the construction and operation of facilities for the interstate transportation of gas require a certificate of convenience and necessity issued by the Federal Power Commission. It has not been contended in this case that any provision of that Act purports to grant to the states any regulatory jurisdiction not previously possessed. Appellees contended below that, prior to that Act, direct sales were subject to state regulation and they were intended by Congress to remain so. Appellant contends that such sales were theretofore protected from state regulation of the character involved here by the Commerce Clause, of its own force, and that such protection has in no respect been withdrawn by the Act.

The Supreme Court of Indiana did not profess to find anything in the language of the Act which purports to withdraw such protection. It concluded, however, from the failure of Congress to include direct sales in the scheme of federal regulation, from language in the Committee reports when the Act was under consideration, and from general language in some of the subsequent decisions of this Court: that Congress considered all transactions over which jurisdiction was not given to the Federal Power Commission as local matters left to state regulatory bodies; that Congress did not believe uniformity in

the regulation of direct sales to be necessary; and that Congress did not believe the national interest in the regulation of such business outweighed local needs (R. 206, 207).

Even if the record sustained the conclusion of the court below that Congress actually entertained such views, that fact in and of itself could neither have changed the existing law nor have withdrawn from appellant's business any protection of the Commerce Clause which it had previously enjoyed. Congress may, of course, redefine the distribution of power over interstate commerce (*Southern Pac. Co.* v. *Arizona*, 325 U. S. 761; 769; *Prudential Ins. Co.* v. *Benjamin* (1946), 328 U. S. 408, 434) so as to remove the protection of the Commerce Clause, but this Court has never held that this can be done by a mere failure to include a wholly interstate phase of a business in a scheme of federal regulatory legislation, regardless of what belief as to existing law may have motivated the omission. More than a hundred years ago in *Postmaster General of U. S.* v. *Early* (1827), 12 Wheat. 136, 148, Chief Justice Marshall said that "a mistaken opinion of the legislature concerning the law does not make law."

Establishment of a principle that the intention of Congress to remove the protection of the Commerce Clause, not expressed in actual legislation, may be ascertained by inference from isolated statements made in committee reports, or statements by witnesses at hearings, as to the possible reasons for its failure to enact particular legislation would give rise to endless uncertainty and be fraught with serious and far-reaching consequences.

Actually there is no reliable or conclusive evidence that the problem of direct sales of gas to industrial consumers was given any extended consideration by Congress in the enactment of the Natural Gas Act. The primary problem to be dealt with was that the states were limited in exer-

cising their authority to regulate consumer rates of their local distributing companies because there was no regulation of the price the distributing companies were required to pay to the pipeline companies. As stated in *Colorado-Wyoming Gas Co.* v. *Federal Power Comm.* (1945), 324 U. S. 626, 630, 89 L. Ed. 1235, 1239, "* * * the purpose of the Act was to provide 'an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' "

As noted by the court below (R. 206), it is stated in Report No. 709, 75th Cong., 1st Sess., referred to by this Court in *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 467, that:

> "The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of Congressional prohibition subject to state regulation. (See Pennsylvania Gas Co. v. Public Service Commission (1920), 252 U. S. 23)."
>
> "There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction."

Citation of the *Pennsylvania Gas Co.*, case in support of the statement made indicates that the reference was to sales to local consumers of the character involved in that case. As previously pointed out, this Court in *Arkansas-Louisiana Gas Co.* v. *Dept. of Public Utilities* (1938) 304 U. S. 61 had left the question of direct sales to industrial consumers open for future determination.

The report of the "Hearing before the Sub-Committee of the Committee on Interstate and Foreign Commerce of

the House of Representatives" (74th Congress, 2nd session) on H. R. 11662,[5] April 1936, incorporated as a part thereof the brief of Mr. Dozier A. DeVane, then Solicitor for the Federal Power Commission, which brief was submitted to the Committee by Mr. DeVane at the time of his appearance for the purpose of explaining the various sections of the bill. In speaking of direct sales, Mr. DeVane said in his brief (p. 17 of the said report):

> "The bill makes no attempt to regulate the production or gathering facilities of a natural-gas company. * * * *Likewise natural gas in the process of transportation in high-pressure mains in interstate commerce for industrial use is excluded upon the basis that such sale is made under highly competitive conditions and is not imbued with a public interest.*" (Italics supplied.)

Congress had the right to determine, and, we think, did determine, that regulation of the rates for sales to large industrial consumers required no governmental regulation at that time because of the extent to which other fuels had been competitive with natural gas and the bargaining

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[5] The bill that was finally enacted by the Congress as the "Natural Gas Act" was H. R. 6586. In its report to the House (Rep. No. 709, H. Repres., 75th Congress, First Session), the Committee states that the said H. R. 6586 "is substantially identical with H. R. 12680", which, as amended, had been favorably reported by the Committee in the 74th Congress, Second Session. The H. R. 12680 referred to in the said report contained the following provision as a part of Section 1(b): "Provided, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges * * * *for the sale of natural gas for industrial use only.*" (Emphasis supplied.) An identical provision was contained in Section 1(b) H. R. 11662.

In the bill, as finally enacted, the exclusion clause is even broader in scope: Sec. 1(b) "the provisions of this Act— * * * shall not apply to *any other* transportation or sale of natural gas * * *." (Emphasis supplied.)

power of the class of consumers involved. This view is strongly fortified by Report No. 800, 80th Cong., 1st Sess., submitted July 7, 1947 by the Committee of the House on Interstate and Foreign Commerce with reference to amending the Natural Gas Act (*ante*, pp. 51-53). The report of the Hearing before the Committee on Interstate and Foreign Commerce, House of Representatives (80th Cong., 1st Sess., on H. R. 2185, etc., April 14th, *et seq.*) includes a statement of the advisory counsel of the National Association of Railroad and Utilities Commissioners expressing the view that Congress had intended in enacting the Natural Gas Act to leave to state regulation all direct sales to consumers of any character (p. 636 of said report) and incorporated in the record in support of the assertion the opinion of the Supreme Court of Indiana in this case (pp. 656 to 660).

The Association proposed the following amendments (set forth at p. 641 of said report) described (p. 635 of said report) as intended to reaffirm the original purpose of Congress when it enacted the Natural Gas Act:

"Amend section 1 of said bill by adding thereto the following subsections:

'(d) The Congress hereby declares that the regulation by the several States of the business of production and gathering of natural gas and of the transportation and sale thereof, except so far as by this act made subject to regulation by the Commission, is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to such regulation by State authority.

'(e) Except only so far as by this act made subject to the jurisdiction of the Commission, the business of production and gathering of natural gas,

and transporting and selling the same, and every part of such business, is declared to be local in character, and shall continue to be subject to regulation under the laws of the several States, and such regulation shall not be held to be a burden on interstate or foreign commerce.'"

The intention imputed to Congress by the court below is repudiated by the Committee in unmistakable language. Its Report No. 800, 80th Cong., 1st Sess., at p. 10, states:

"Your committee has considered the amendment offered by the National Association of Railroad and Utility Commissioners, proposing to permit the various States to exercise jurisdiction over direct sales, and has concluded that the adoption of the amendment would not be in the public interest but would be more likely to add to the existing confusion.

"The pipe line does not occupy a utility status with reference to direct sales. By the regulation of the utilities which serve him, the small consumer who goes about his day's work is protected from exorbiant rates, but direct sales are made to businesses, factories, etc. They are sales at arm's length. The purchaser is engaged in the business of securing fuel at the lowest possible price. He is his own protection. He does not need the aid of a regulating authority. Competition is the proper arbiter of prices in such direct sales. As in other businesses under our competitive system of free enterprise, this problem should be left to the businessmen themselves, to the pipe lines and their customers. They know the business and deal with each other on a fair-bargaining basis.

"Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by

a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different States. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its affect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between different States demanding gas as between States and the pipe lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction as against the demands of the States to regulate prices, to interrupt service and to curtail service."

This language not only negatives any intention of Congress that appellant's direct sales should be left to state regulation but also negatives any belief on the part of Congress that they were subject to such regulation under the decisions of this Court at the time the Natural Gas Act was adopted. The view there expressed that no regulation of rates for such sales is presently necessary is strongly supported by that part of the record in *Colorado Interstate Gas Co.* v. *Federal Power Commission* (1945), 324 U. S. 581, 613, 614 referred to by Mr. Justice Jackson in his concurring opinion, in pointing out that the large industrial consumer, Colorado Fuel and Iron Company, was shown to have been adequately protected, in the absence of governmental regualtion, by other fuel competition and its own bargaining power. As hereinbefore pointed out the Colorado Commission had held in 1933 (P. U. R. 1933E 349) that it had no jurisdiction over the industrial consumer sales of Colorado Interstate.

The decision of the court below derives no support from the language of the decisions of this Court rendered since the Natural Gas Act was enacted. While this Court has several times referred in its opinions to an intention of Congress in enacting that legislation to create a comprehensive scheme of regulation which would be complementary to that of the States, the Court has not in connection with any such statement been dealing with the problem of direct sales to industrial consumers.

In the language quoted by the court below from *Public Utilities Comm. of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 467 this Court said:

> "The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies."

The court below says (R. 206) that:

> "Inferentially this means that those transactions over which jurisdiction was not given to the Federal Power Commission may be considered as local matters and left to state regulatory bodies."

But the language of this Court relied on does not justify the inference that all transactions over which jurisdiction was not given to the Federal Power Commission must be classified as local. Instead, the implication is that the jurisdiction of that Commission over matters in interestate commerce is not complete since such jurisdiction is to be exercised only "to the extent defined in the Act", and that the matters to be left to state regulatory bodies are local, rather than matters in interstate and foreign commerce. The question still remains whether the sales involved here are local as held by the Indiana court or part of an indivisible transaction in interstate commerce of primary

national concern as appellant contends and as Report No. 800, 80th Cong. 1st Sess., p. 10 strongly indicates that Congress actually believes. The Natural Gas Act does not determine this basic question.

Conclusion

The importance of this case is shown by the fact that the question presented has engaged the attention of Congress no longer ago than the Report of the Committee of the House on Interstate and Foreign Commerce (No. 800, 80th Cong., 1st Sess.) on July 7, 1947. It is stated in the report of hearings on which that Report is based that some of the largest pipeline companies are contesting the jurisdiction of the States to regulate direct sales and that there is litigation not yet concluded in Michigan as well as Indiana (p. 636). In Michigan, the lower court held with the pipeline company and an appeal is pending in the Supreme Court of that State (p. 643). Appellant operates in seven other states and, at the time this case was before the Indiana Commission, made direct sales to industrial consumers in Michigan, Illinois, Missouri, and Kansas, as well as Indiana (R. 47). Other pipeline companies have industrial consumers in many different states. It is important to the State Commissions as well as the pipeline companies to know whether the rates and service in connection with said sales are subject to agreement of the parties or to the regulatory authority of the various states. The principles which this Court lays down in this case are certain to have a far-reaching effect not only on the natural gas industry which will become increasingly more important as additional facilities become available for the long range transportation of natural gas, but on many other phases of the extent of the protection of the Commerce Clause against state regulation, or prohibition, of the sale of other fuels and commodities transported in interstate commerce.

We have shown that the orders of the Public Service Commission of Indiana complained of herein and the Statutes of Indiana upon which they are based, as applied to appellant, are repugnant to Article I, Section 8(3) of the Constitution, and it is respectfully submitted that the judgment of the Supreme Court of Indiana in this case should be reversed and the judgment of the Circuit Court of Randolph County, State of Indiana, should be affirmed.

Respectfully submitted,

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Appendix

Indiana Acts 1913, ch. 76, Sec. 97 as added by Acts 1945, ch. 53, Sect. 1, p. 110 (Burns' Ind. Stat. Ann. 1933, 1945 Pocket Supp. Sect. 54-601a):

Chapter 53

An Act to amend an act entitled "An Act concerning public and municipally owned utilities, authorizing municipalities to hold, own, acquire, construct and operate utilities and to issue bonds to pay therefor, providing the manner in which such municipalities may acquire and pay for such utilities, abolishing the railroad commission of Indiana and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, as said title was amended by Chapter 190 of the Acts of 1933, approved March 8, 1933, by adding thereto a new section numbered section 97a, providing for the granting, transfer and revocation of certificates of public convenience and necessity for the rendering of gas utility service direct to consumers in rural areas in the State of Indiana, and declaring an emergency. (H. 295. Approved February 26, 1945.)

Public Service Commission Act—New Section—Section 97a—Meaning of Terms—Concerning Granting, Transfer and Revocation of Certificates of Public Convenience and Necessity for Gas Utility Service Direct to Consumers in Rural Areas—Amendment.

Section 1. Be it enacted by the General Assembly of the State of Indiana: That the above entitled act be and is hereby amended by adding thereto, immediately following section 97 thereof, a new section to read as follows:

Sec. 97A. (a) When used in this section, unless the context otherwise requires

(1) the term "gas" means and includes natural gas, artificial or manufactured gas, and mixed gas, or any of them;

(2) the term "necessity certificate" means a certificate of public convenience and necessity issued by the commission pursuant to the provisions of this section, which certificate shall be deemed an indeterminate permit;

(3) the term "rural area" means territory within the State of Indiana that is outside the corporate limits of a municipality;

(4) the term "gas utility" means and includes any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use; and

(5) the term "gas distribution service" means the furnishing or sale of gas directly to any consumer within the State of Indiana for his or its domestic, commercial or industrial use.

(b) It is hereby declared that in order adequately to protect the public interest in the distribution of gas to consumers within the State of Indiana, it is necessary and desirable that to the extent provided herein the holding of necessity certificates should be required as a condition precedent to the rendering of gas distribution service in rural areas of the State of Indiana.

(c) After the date that this section becomes effective, no gas utility shall commence the rendering of gas distribution service in any rural area in the State of Indiana in which it is not actually rendering gas distribution service at the effective date hereof, without first obtaining from the commission a necessity certificate authorizing such gas dis-

tribution service, defining and limiting specifically the rural area covered thereby, and stating that public convenience and necessity require such gas distribution service within such real area by such gas utility; and no gas utility hereby required to hold a necessity certificate for any rural area shall render gas distribution service within such a rural area to any extent greater than that authorized by such necessity certificate or shall continue to render gas distribution service within such rural area if and after such necessity certificate has been revoked or transferred as in this section provided.

(d) Whenever any gas utility proposes to commence the rendering of gas distribution service in any rural area in which it is not actually rendering such service at the date on which this section becomes effective, it shall file with the commission a verified application for a necessity certificate covering such service by it. The commission shall, by regulations, prescribe the form of application and such application shall conform to such prescribed form. Within a reasonable time after the filing of any such application the commission shall fix a time and place for public hearing thereon. Notice of such hearing shall be given in such manner and to such persons as is from time to time required by law or by the regulations of the commission. Such hearing shall be held in the manner prescribed for a hearing in sections 57 to 71, both inclusive, of this act, and the provisions of such sections so far as applicable shall apply to such hearing. Any person interested in such proceedings, including without limiting the generality of the foregoing any gas utility rendering gas distribution service within the general service area (including territory within and without municipalities) of which the rural area covered by the application may reasonably be deemed a part, shall be permitted to appear either in person or by attorney and

offer evidence in support of or opposition to the applica tion. The applicant shall, at all times, have the burden o proving by evidence each of the matters hereinafter spec fied as necessary to be found by the commission before necessity certificate shall be issued by it. If the commissio shall find from the evidence, including such evidence, if any as the commission may cause to be introduced as a resul of any investigation which it may have made relative t the matter, that the applicant therefor has lawful powe and authority to obtain such necessity certificate and t render the proposed gas distribution service if it obtain such certificate, that he or it has the financial ability t provide the proposed gas distribution service, that publi convenience and necessity require the rendering of th proposed gas distribution service, and that the public in terest will be served by the issuance of the necessity certifi cate to him or it, the application shall be granted, subjec to such terms, restrictions and limitations as the commis sion shall determine to be necessary and desirable in th public interest; otherwise the application shall be denied.

(e) Upon approval by the commission given after notice and public hearing given and held in the manner provided for in subdivision (d) of this section in cases of applications for necessity certificates, but not otherwise, any necessity certificate may (1) be sold, assigned, leased or transferred by the holder thereof to any person, firm or corporation to whom a necessity certificate might be lawfully issued, or (2) be included in the property and rights encumbered under any indenture of mortgage or deed of trust of such holder.

(f) Any necessity certificate may, upon application by the holder thereof to the commission, be revoked by the commission, in whole or in part, after notice given and hearing held in the manner provided for in cases of ap-

plications for necessity certificates. Any necessity certificate may, after notice given and hearing held in the manner provided for in cases of applications for necessity certificates be revoked by the commission, in whole or in part, for the failure of the holder thereof to comply with any applicable order, rule or regulation prescribed by the commission in the exercise of its powers under this act, or with any term, condition or limitation of such necessity certificate.

Emergency.

Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.